

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of Case

Criminal Jail Appeal No. 160 of 2002

Date of decision: 21.9.2004

For the approval of:-

Hon'ble Mr. Justice J.C.S. Rawat

- Whether the order/judgment should be sent to the reporters for reporting?

Yes

- Whether the reporters be allowed to see the judgment?

Yes

Dated 21.9.2004

LSR

HIGH COURT OF UTTARANCHAL, AT NAINITAL

Criminal Jail Appeal No. 160 of 2002

Jayas S/o Sri Ratan Singh	Appellant
Versus	
State	Respondent

Ms. Geeta Parihar learned Amicus Curiae for the appellant.
Mr. H.C. Pandey and Mr. Nandan Arya learned A.G.A.

Hon'ble J.C.S. Rawat, J.

This is a criminal jail appeal against the judgment and order dated 18.5.2002 passed by Sri V. K. Maheshwari, the then Additional Sessions Judge, Nainital in S.T. No. 8/1998, whereby the Addl. Sessions Judge has convicted the appellant and sentenced him to undergo RI for ten years under section 20 N.D.P.S. Act and to pay a fine of Rs. 1,00,000/-. In default of payment, the appellant to undergo two years imprisonment.

2. The case of the prosecution, in brief, are that on 11.8.1997 at about 12:40 Sub-Inspector Sitaram Verma alongwith police personnel was on petrol duty near the Jhankaiya Sharda Bridge. Meanwhile the Circle Officer, Rudrapratap Singh also reached there. The police party saw that the appellant was waiting near the Shiv Mandir for bus to go to Khatima. The police party apprehended the appellant. They started the search of the appellant and the appellant had a plastic bag in his hand and on search 500GM contraband material (Charas) was recovered from the plastic bag of the appellant. Then the police party prepared the recovery memo Ex.ka.1. On the basis of recovery, check FIR (EX.ka.2) was lodged at the police station Khatima. The contraband material (Charas) was sent for chemical examination and on receipt of its report (Ex.ka.4) found that it was Charas.

The investigation was taken up as usual which culminated into the submission of the chargesheet.

3. Charge under section 20 of the N.D.P.S. Act was framed against the appellant. The appellant denied the charge and claimed the trial.

4. In order to prove its case, the prosecution examined two witnesses i.e. Constable Om Veer Singh (PW-1) and Constable Ram Veer Singh (PW-2). They proved the factum of recovery of contraband material (Charas) from the possession of the appellant on the date of occurrence and they also narrated the prosecution story as stated above.

5. The learned trial court on appraisal of the entire evidence and record held the accused-appellant guilty under section 20 N.D.P.S. Act and sentenced the appellant as mentioned above.

6. I have heard Ms. Geeta Parihar learned Amicus Curiae for the appellant and Sri H.C. Pandey learned A.G.A. and gone through the record.

7. I have scanned the testimony of the witnesses and found it consistent and also corroborating each. The evidence was cross-examined at length but nothing came out in the cross examination so as to impeach the testimony.

8. The learned Amicus Curiae for the appellant did not dispute the propriety of the finding of the learned Addl. Sessions Judge in regard to the guilt of the appellant who had been convicted for the offence punishable under

section 20 N.D.P.S. Act and submitted that the appellant may be given the benefit of the provisions of the amended Act No. 9/2001.

9. The provisions of N.D.P.S. Act were amended by the Amending Act No. 9/2001 which rationalized the structure of the punishment under the Act by providing graded sentences linked to the quantity of narcotic drugs or psychotropic substance in relation to which the offence was committed. The amending Act introduced the concept of 'commercial quantity' in relation narcotic drugs and psychotropic substance defined under section 2 (vii-a), the concept of "small quantity" as defined under section 2 (xxiii-a) and the concept in between the 'small quantity' and the 'commercial quantity'. Under the graded structure, the punishment would vary depending on the quantity of the narcotic drug and psychotropic substance defined as above.

10. Section 41 of the amending Act No. 9/2001 is the provision which determines the application or exclusion of the amending provisions which is as under:-

"41. Application of this Act to pending cases:-

(1) Notwithstanding anything contained in sub-section (2) of Section1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment with is lesser than the punishment for which he is otherwise at the date of commission of such offence.

Provided that nothing in this section shall apply to cases pending in appeal.

(2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force."

11. It need to be mentioned that in the present case in hand the trial court held the appellant guilty on 18.5.2002 and the appeal was filed before this court on 25.6.2002. The amending Act No. 9/2001 came into force on 2.10.2001. The proviso of Section 41 (1) provides that nothing in this Section shall apply to the cases pending in appeal. According to provisions of Section 41 the appeals pending on 2.10.2001 when Act No. 9/2001 came into force, would be disposed of in accordance with the provisions of N.D.P.S. Act, 1985 as it stood before 2.10.2001. In the instant case the appeal was not pending on 2.10.2001. The appeal was filed after the enforcement of the amendment Act. Thus, the provisions of the amending Act will be applicable and the proviso of Section 41 of Act No. 9/2001 will not be applicable in this appeal.

12. The Hon'ble Supreme Court has observed in **Basheer Vs. State of Kerala SCC 2004 (3) p/609** that in the cases where the trials are concluded and appeals are pending, the application of the amended Act No. 9/2001 appears to have been excluded so as to preclude the possible contingency of reopening concluded trials. In that judgment, the classification is very much rational and based on clearly intelligible differentia, which has rational nexus with one of the objectives to be

achieved by the classification. There is one exceptional situation, however, which may produce an anomalous result. If the trial had just concluded before 2.10.2001, but the appeal is filed after 2.10.2001, it cannot be said that the appeal was pending as on the date of coming into force of the amending Act No. 9/2001, and the amendment would be applicable even in such cases.

13. As regards the sentence is concerned by virtue of the amendment of the relevant provisions of N.D.P.S. Act, the provision regarding quantum of sentence stand modified. As per the notification under the relevant provision of the Act and commercial quantities of the contraband have been separately categorized and provision for different sentences and also for the quantity of the contraband falling in between the two said categories has been provided. The appellant was found in possession of 500 GM of charas which falls in between two categories namely, small quantity and commercial quantity and the punishment provided for possessing this much of the quantity of the Charas is given under section 20(B) of the N.D.P.S. Act. According to this the appellant may be punished with R.I. for a term which may be less than 10 years and to fine which may be less than one lac rupees. Considering the facts and circumstances of the case and also the antecedents of the appellant, who has no previous conviction to his credit, the learned Amicus Curiae submitted that the ends of justice may be satisfied even if the appellant is sentenced to undergo RI for the period already undergone and a lesser amount of fine then imposed by the learned trial court. The appellant was arrested on 11.8.1997 and since then he is in jail and considering the said period, the submission of the learned Amicus Curiae for the

appellant cannot be said to be without substance and force. In the face of the facts of the case, the sentence for imprisonment for the period already undergone and a fine of rupees ten thousands would be sufficient to meet the ends of justice

14. The appeal is thus partly allowed. The period of sentence and fine imposed is modified and the appellant is sentenced to the period already undergone and to pay a fine of Rs. 10,000/- (Rupees ten thousand only) under section 20 N.D.P.S. Act. In default of payment of fine, the appellant shall undergo RI for further six months.

(J.C.S. Rawat, J.)

Dated 21.9.2004
Rawat